

Certain Underwriters v. Cravens Dargan & Co., 05-56154

AUG 14 2006

GOULD, J., concurring:

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

I concur in the memorandum disposition. I do so with some misgivings based on the theory of arbitration: Because arbitration is a creature of contract, it is odd that certain underwriters of reinsurance should be considered by us bound to arbitrate before an arbitral panel that was not in any way selected by them. *Green Tree Fin. Corp. v Bazzle*, 539 U.S. 444, 456 (2003) (Rehnquist, C.J., dissenting) (“Just as fundamental to the agreement of the parties as *what* is submitted to the arbitrator is to *whom* it is submitted.”). The Appellants did agree in their reinsurance contract to arbitrate any dispute, and in parallel agreements other aggregations of underwriters, at different levels or times, also agreed to arbitrate. The district court probably viewed the issue of one consolidated arbitration as essentially a “procedural” issue to be decided by an arbitrator, and not as a “gateway” issue of arbitrability to be decided by a court, with the arbitrator empowered to address the issue of consolidation.

I have difficulty with this in light of the contractual nature of arbitration, and the fact that different persons or entities wrote reinsurance covering different levels or times under different contracts, and all are bound initially to arbitrate together. Notwithstanding, I agree that the district court’s conclusion should be affirmed. If we wrote on a clean slate I might approach it otherwise, but I conclude that

affirmance is supported by the guidance given us by the Supreme Court in *Green Tree Financial Corp. v Bazzle*, 539 U.S. 444 (2003), and in *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002), as well as by the holdings of our sister circuits considering analogous issues in *Employers Insurance Co. of Wausau v. Century Indemnity Co.*, 443 F.3d 573 (7th Cir. 2006); *Dockser v. Schwartzberg*, 433 F.3d 421 (4th Cir. 2006); *Shaw's Supermarkets, Inc. v. United Food and Commercial Workers Union, Local 791, AFL-CIO*, 321 F.3d 251 (1st Cir. 2003).